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Coyne International Enterprises Corp., d/b/a Coyne Textile Services, a New York corporation v. Zions First National Bank : Brief of Appellant

Utah Court of Appeals

William G. Marsden; Jennie B. Huggins; Jardine, Linebaugh, Brown and Dunn.
Craig Carlile; James L. Wilde; Ray, Quinney and Nebeker.

IN THE UTAH SUPREME COURT

STATE OF UTAH

COYNE INTERNATIONAL ENTERPRISES CORP., d/b/a COYNE TEXTILE SERVICES, a New York corporation,	:	
Plaintiff and Appellant,	:	No. 950355 930400620CN
v.	:	Argument Priority 15
ZIONS FIRST NATIONAL BANK,	:	
Defendant and Appellee.	:	

BRIEF OF APPELLANT

Appeal from a Summary Judgment of the Fourth Judicial District Court, The Honorable Ray M. Harding, District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF COURT'S JURISDICTION

This Court has jurisdiction over this appeal pursuant to the provisions of Section 78-2-2(3)(j) of the Utah Code, 1994, as amended.

STATEMENT OF THE ISSUES

A. GENERAL STANDARD FOR REVIEW

As this case involves an appeal from an order granting Zions First National Bank's ("Bank") motion for summary judgment, this Court should give no particular deference to the trial court's legal conclusions, but rather should review those conclusions under a correctness standard. Young v. Salt Lake City Corp. 876 P.2d 376, 377 (Utah 1994); Mountain States Telephone and Telegraph, Company v. Garfield County, 811 P.2d 184, 192 (Utah 1991). Particularly in a case such as this where all parties submitted their respective motions for summary judgment upon affidavits, documents identified in affidavits and responses to discovery, and where the trial court did not observe the demeanor, credibility or competency of witnesses, the trial court's legal conclusions should not be given any special weight or deference by an appellate court. See Matter of Adoption of Infant Anonymous, 760 P.2d 916, 918 (Utah App. 1988).

B. SPECIFIC ISSUES FOR REVIEW

I. Did the Trial Court Err in Failing to Grant Plaintiff's Own Motion for Summary Judgment Since Plaintiff Submitted to the Bank a Proper Demand on a Letter of Credit, Which Demand was Never Withdrawn or Revoked, and Should Have Been Honored?

Standard of Review: Correctness. Young, supra.

Citation to Record Showing Issue Preserved. Record ("R") 273-275, 287.

II. Did the Trial Court Err in Finding that Plaintiff's Letters Instructing the Bank to Hold the Proceeds of the Letter of Credit Were Withdrawals of the Prior Demand for Payment of the Letter of Credit?

Standard of Review: Correctness. Christiansen v. Holiday Rent-a-Car, 845 P.2d 1316, 1319 (Utah App. 1992) cert. den. 853 P.2d 897 (Utah 1993).

Citation to Record Showing Issue Preserved. R-192-197, 269-271, 287.

III. Did the Trial Court Err in Finding that the Letter of Credit Expired Before Plaintiff Made Demand on That Letter? By Failing to Give Coyne Notice of Any Problem Until After the Letter of Credit Had Allegedly Expired, Is the Bank Estopped From Now Claiming Expiry?

Standard of Review: Correctness. Texaco Inc. v. San Juan County, 869 P.2d 942, 949 (Utah 1994).

Citation to Record Showing Issue Preserved. R-192-193, 271-273, 287.

IV. Did the Trial Court Err by Not Finding that the Bank Failed to Comply with the Requirements of the UCP Which Were Part of the Letter of Credit? As a Result Is the Bank Estopped From Claiming Plaintiff May Not Recover Under the Letter of Credit?

Standard of Review: Correctness. East Jordan Irrigation Company v. Morgan, 860 P.2d 310, 312 (Utah 1993).

Citation to Record Showing Issue Preserved. R-192-193, 271-273, 287.

V. Did the Trial Court Err in Refusing to Allow Plaintiff's Request for Oral Argument on the Summary Judgment Issue?

Standard of Review: Correctness. Matter of Estate of Anderson, 821 P.2d 1169, 1171 (Utah 1991).

Citation to Record Showing Issue Preserved. R-98, 277-278, 287.

DETERMINATIVE STATUTORY AND REGULATORY PROVISIONS

I. Utah Code Annotated, Section 70A-5-116(3):

Except where the beneficiary has effectively assigned his right to draw or his right to proceeds, nothing in this section limits his right to transfer or negotiate drafts or demands drawn under the credit.

II. Utah Code Annotated, Section 70A-9-306(1)

"Proceeds" includes whatever is received upon the sale, lease, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. Money, checks, deposit accounts, and the like are "cash proceeds." All other proceeds are "noncash proceeds."

III. Utah Code of Judicial Administration, Rule 4-501(3).

(b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(c) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(d) When a request for hearing is denied, the court shall notify the requesting party. . . .

IV. Uniform Customs and Practice for Documentary Credits (1983 Revision), International Chamber of Commerce Publication No. 400 ("UCP"), Article 16.

(d) If the issuing bank decides to refuse the documents, it must give notice to that effect without delay by telecommunication or, if that is not possible, by other expeditious means, to the bank from which it received the documents (the remitting bank) or to the beneficiary, if it received the documents directly from him. Such notice must state the discrepancies in respect of which the issuing bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to the presentor (remitting bank or beneficiary as the case may be). . .

(e) If the issuing bank fails to act in accordance with the provisions of paragraphs (c) and (d) of this article and/or fails to hold the documents at the disposal of, or to return them to, the presentor, the issuing bank shall be precluded from claiming that the documents are not in accordance with the terms and conditions of the credit.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The Appellant, Coyne International Enterprises Corp., d/b/a Coyne Textile Services ("Coyne") brings this action against the Bank, asserting that the Bank should be ordered to honor and pay to Coyne the full proceeds of a certain letter of credit

("Letter of Credit") issued by the Bank in favor of Coyne in the sum of $33,000.00. Both Coyne and the Bank filed motions for summary judgment in the District Court proceeding. Coyne also filed a request for oral argument with respect to its motion for summary judgment. Coyne appeals from the Order of the District Court granting the Bank's motion for summary judgment and denying Coyne's motion for summary judgment and request for oral argument.

The lower court order is dated July 17, 1995 and was signed by the Honorable Ray M. Harding, District Judge, of the Fourth Judicial District Court in and for Utah County, State of Utah. On August 16, 1995, Coyne timely filed its appeal from the District Court order.

II. STATEMENT OF FACTS

1. By a Lease Agreement dated August 1, 1983, Coyne had a leasehold interest in a Learjet 25D airplane, manufacturer's serial no. 362, United States registration no. N52CT (currently N717CW), together with two General Electric CJ610-8A engines, manufacturer serials nos. E-211300A and E-211302A respectively. R-245. (The Learjet airplane and the motors are collectively referred to as the "Aircraft" throughout this appellant's brief).

2. On or about June 24, 1992, Coyne and Avstan, L.C., ("Avstan"), a Utah limited liability company which is not a party to this action, entered into a Sublease Agreement ("Sublease"). In the Sublease Coyne, as lessee, agreed to sublease the Aircraft to Avstan, as sublessee. R-222-245.

3. As part of the transaction involving the Sublease, on or about June 24, 1992, Stanley R. Pope, an individual ("Pope"), and Stanco, Inc., a Utah corporation ("Stanco") signed and delivered a guaranty to Coyne, by which both Pope and Stanco guaranteed "full and prompt performance and payment of all obligations. . ." which Avstan owed to Coyne under the Sublease. R-218-219.

4. Paragraph 4(c) of the Sublease provided that Avstan would provide an irrevocable letter of credit in the sum of $33,000 in favor of Coyne, which letter of credit would be security for Avstan's obligation to make rental payments under the Sublease. R-242. Bank was to issue the irrevocable letter of credit in favor of Coyne. Id.

5. On or about June 23, 1992, Bank issued its Irrevocable Letter of Credit no. 005248 ("Letter of Credit") in favor of Coyne. R-91; Addendum "A." The Letter of Credit was payable to Coyne in its full face amount of $33,000 upon Bank's receipt of a written statement on Coyne's letterhead, signed by

an officer of Coyne, that Pope had ". . . not fulfilled the term of the contract . . ." relating to the Sublease. R-91, 216; Addendum "A."

6. The Letter of Credit also contained the following language:

> This Credit is Subject to the Uniform Customs and Practice for Documentary Credits (1983 Revision). International Chamber of Commerce. Publication No. 400.

Id. (The language of the relevant portions of the UCP is contained on pages 4-5 of this brief. The full text of the Letter of Credit is contained in Addendum "A."

7. By letter dated May 24, 1993, Coyne gave the Bank the written notice required by the Letter of Credit that Pope had defaulted on the terms of the contract relating to the Sublease. R-89, 103, 209; Addendum "B." The Letter of May 24, 1993 was written on Coyne's corporate letterhead and was prepared and signed by one of Coyne's officers. Id. Through the testimony of one of its authorized officers, the Bank admits that the Letter of May 24, 1993 was a demand on the Letter of Credit. R-70, 95.

8. The Bank never informed Coyne that the Letter of May 24, 1993 was not a sight draft or that the letter in any way failed to comply with the actual requirements for a presentation of demand required by the terms of the Letter of Credit. R-105-106, 249. Neither did the Bank ever tell Coyne that either the

form or content of the demand contained in the Letter of May 24, 1993 was in any way nonconforming, inadequate or defective. Id.

9. On or about May 28, 1993, and four days after Coyne had made the May 24, 1993 demand on the Letter of Credit, Coyne's New York counsel wrote a letter to the Bank. In that Letter of May 28, 1993 Coyne's counsel informed the Bank:

> [T]he proceeds of the letter of credit are not to be paid as directed in Mr. Ryan's demand of May 25, 1993 (sic)[1] and that you should hold the proceeds until you receive further instructions from this office.

R-79, 102, 214. Addendum "C" (emphasis added).

10. The text of the Letter of May 28, 1995 simply instructed the Bank to "hold the proceeds" of the Letter of Credit on which Coyne had made earlier demand. The May 28, 1993 Letter does not use words or terms such as "withdraw," "cancel" or "revoke" with respect to Coyne's earlier May 24, 1993 demand made on the Letter of Credit. Id.

11. On or about June 1, 1993 one of Coyne's officers wrote the Bank and informed it:

> As is set forth in Mr. O'Hara's (Coyne's New York counsel) letter of May 28, 1993, you are authorized to hold the proceeds of the above referenced letter of

---

[1]Although Coyne's counsel writes that Coyne's demand letter is dated May 25, 1993, the actual correct date of Coyne's demand on the Letter of Credit is evident from the date the Letter of May 24, 1993 bears. Coyne's counsel had written Pope a letter on May 25, 1993 and appears to have incorrectly written that both his letter and Coyne's demand on the Letter of Credit were dated May 25, 1993.

> credit until you receive further instructions from Mr. O'Hara.

R-77, 101, 207; Addendum "D" (emphasis added).

12. As was the case with the Letter of May 28, 1993, the Letter of June 1, 1993 simply informed the Bank to hold the Letter of Credit's proceeds until further instruction. Nothing in the Letter of June 1, 1993 uses the words "withdraw", "cancel" or "revoke" in reference to Coyne's earlier demand on the Letter of Credit. Id.

13. At the time the Letters of May 28, 1993 and June 1, 1993 were written, Coyne believed that on account of its earlier demand on the Letter of Credit, the Bank had already reduced the Letter of Credit to proceeds. R-171, 172, 248.

14. Coyne's Letters of May 28, 1993 and June 1, 1993 were written because the Sublease provided for an arbitration proceeding in the event there were a dispute between Coyne, Pope, Stanco and/or Avstan. That arbitration proceeding was resolved in favor of Coyne. Shortly after the arbitration proceeding resolution, Coyne's counsel wrote the Bank on October 25, 1993 and informed it:

> [W]e are now instructing you to forward the entire proceeds of the letter of credit in the amount of $33,000 to [Coyne's counsel].

R-72-73, 99-100, 211-212; Addendum "E" (emphasis added).

15. At no time between May 20, 1993 and October 25, 1993 did the Bank ever inform Coyne in writing or otherwise that the Bank claimed either the Letter of May 28, 1993 or the Letter of June 1, 1993 revoked, rescinded, canceled or withdrew Coyne's earlier May 24, 1993 demand on the Letter of Credit. R-105-106, 249-250. Nor did the Bank ever timely inform Coyne that the Bank claimed the Letter of Credit had expired without a proper demand having been made on the Letter of Credit. R-105-106, 249.

16. At no time prior to the time Coyne filed its complaint did the Bank ever inform or otherwise notify Coyne that Zions had not reduced the Letter of Credit to proceeds or that the Bank would not hold the proceeds of the Letter of Credit as requested by Coyne. R-248.

17. In the proceeding before the District Court, Coyne moved for summary judgment. R-98-99. Included in Coyne's motion for summary judgment was a request for oral argument. Id. After all memoranda had been filed, Coyne filed its notice to submit the summary judgment motions for decision. Included in that notice was a reference to Coyne's request for oral argument. R-277-278.

18. In the District Court's memorandum decision dated May 30, 1995, the Court simply held: "Plaintiff's Request for Oral Argument is denied." R-280; See also similar language in

the order. R-283. In neither the memorandum decision nor in the formal order implementing the memorandum decision did the District Court make any finding that Coyne's motion for summary judgment was frivolous or that the issues raised by Coyne in its motion for summary judgment had been previously and conclusively determined by a prior decision of a Utah court. R-279-281; 283.

SUMMARY OF ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO GRANT COYNE'S MOTION FOR SUMMARY JUDGMENT BASED ON COYNE'S TIMELY DEMAND ON THE LETTER OF CREDIT AND THE BANK'S FAILURE TO GIVE ANY NOTICE OF NONCOMPLIANCE.

In matters involving an issuer of a letter of credit (i.e. Bank) and the beneficiary of the letter (i.e. Coyne), the issuer must simply look to the credit documents and not to the merits of the underlying transaction between its customer (i.e. Pope, Avstan and Stanco) and the beneficiary. Newvector Communications, Inc. v. Union Bank, 663 F.Supp 252, 255, 256 (footnote 16)(D.C. Utah 1987) Utah Code, Section 70A-5-114(1). Coyne submitted a proper, conforming demand on the Letter of Credit. The demand contained in the Letter of May 24, 1993 was a sight draft. Coyne's demand on that letter was never withdrawn, revoked or rescinded. A request that an issuer hold the proceeds of a letter of credit on which a previous demand has been made does not constitute a withdrawal or revocation of the earlier demand.

If the issuer of a letter of credit claims the demand is nonconforming or defective it may not wait until the letter of credit has expired before it first gives the beneficiary notice of dishonor. If a letter of credit issuer claims that a demand made on a letter of credit is nonconforming, the issuer must immediately notify the beneficiary that the issuer has rejected the demand. The Bank failed to give Coyne any notice of dishonor and thereby Coyne was led to believe that its demand had been honored by the Bank. Also, and analogously, where an issuer believes a beneficiary demand on a letter of credit has been revoked or withdrawn, the issuer should be required to notify the beneficiary that the issuer regards the demand as having been withdrawn. The issuer may not lull the beneficiary into believing the demand on the letter is conforming, and then, without warning, belatedly claim the letter of credit has already expired.

II. THE DISTRICT COURT ERRED IN FAILING TO AFFORD COYNE THE OPPORTUNITY FOR ORAL ARGUMENT AFTER COYNE HAD MADE A TIMELY REQUEST FOR ORAL ARGUMENT PURSUANT TO THE UTAH RULES OF JUDICIAL ADMINISTRATION.

The District Court committed reversible error in not affording Coyne the opportunity for oral argument on its motion for summary judgment. Unless the District Court specifically found (and it did not so find) that Coyne's motion was frivolous or that prior Utah law had already decided the issues raised in

Coyne's motion, that court was obliged to allow Coyne the right to have oral argument in favor of its, and against the Bank's, motion for summary judgment.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO GRANT COYNE'S MOTION FOR SUMMARY JUDGMENT BASED ON COYNE'S TIMELY DEMAND ON THE LETTER OF CREDIT AND THE BANK'S FAILURE TO GIVE ANY NOTICE OF NONCOMPLIANCE.

A. The May 24, 1995 Letter Was a Proper, Conforming Demand or Draw on the Letter of Credit.

The Letter of Credit's language provides:

> We [the Bank] hereby establish our Irrevocable Letter of Credit in your [Coyne's] favor for the account of Stanley R. Pope . . . up to the aggregate amount of USD 33,000.00 available by your draft(s) drawn at sight on Zions First National Bank, Salt Lake City, Utah accompanied by: State on Coyne Textile Service letterhead purportedly signed by an officer of Coyne Textile Service that Stanley R. Pope has not fulfilled the term of contract relating to the lease of one Learjet 25-D aircraft stating the reason. . . . (emphasis in original)

R-91-216; Addendum "A."

The Letter of Credit required Coyne to submit no other documents in conjunction with any draw Coyne would make on the Letter of Credit. Id.

On May 24, 1993, Coyne's Treasurer wrote the Bank on a document bearing Coyne's letterhead:

> This is to certify that Stanley R. Pope has not fulfilled the terms of the contract relating to the lease of one Learjet 25-D. Mr. Pope has defaulted in

> the payment of rent and other amounts in excess of the face amount of the attached letter of credit.
>
> Please pay the entire amount of Thirty-Three Thousand ($33,000.00) Dollars to our attorney, David P. O'Hara, at the following address:
>
> [address omitted]

R-89, 103, 209; Addendum "B."

It is undisputed that the Bank received the May 24, 1993 demand on the Letter of Credit. R-106-107. It is also undisputed that the Bank never gave Coyne any written or other notice that the Letter of May 24, 1993 was in any way a defective, nonconforming or inadequate draw on the Letter of Credit. R-105-106.

The May 24, 1993 Letter was proper in both form and content as a demand draw on the Letter of Credit. The Utah Uniform Commercial Code indicates that an instrument is a draft if it contains an order to pay. Utah Code, Section 70A-3-104(5). Although the specific issue does not appear to have been decided by an appellate court in Utah, cases involving letters of credit in other jurisdictions have held that a letter containing an order to pay satisfies the requirements for an enforceable sight draft under the UCC.

In Chase Manhattan Bank v. Equibank, 394 F.Supp 352 (D.C. Pa. 1975), rev'd on other grounds 550 F.2d 882 (3rd Cir. 1977) one of the issues before the district court was whether a

request for payment under a letter of credit, could be a "sight draft." The federal district court in Pennsylvania held that a telex which made demand for payment met the requirement of a sight draft. The opinion observes:

> A sight draft is an order for the immediate payment of money from a bank. In the instant case, the telex in question contained a direction that money be transferred to Equibank's account at the Chase Bank in New York. Equibank argues that this was not a demand and, therefore, the telex could not be considered a draft. However, Comment 2 to Section 3-102 of the Uniform Commercial Code states: '. . . In the case of orders the dividing line between 'a direction to pay' and 'an authorization or request' may not be self-evident in the occasional, unusual, and therefore non-commercial case. The prefixing of words of courtesy to the direction--as 'please pay' or 'kindly pay' should not lead to a holding that the direction has degenerated into a mere request. . . '
>
> Upon examination of this particular transaction, . . . we conclude that the telex of April 30, 1973 meets the requirements of a sight draft. Chase intended it to be a draft, and it was so treated by Equibank upon receipt.

Chase Manhattan, supra 394 F.Supp. at 356.

And in Temple Eastex Incorporated v. Addison Bank, 672 S.W. 2d 793 (Tex. 1984), the Supreme Court of Texas held that where a bank had issued an irrevocable letter of credit that was to be honored upon the beneficiary's presentation of a sight draft and an affidavit of default, the letter of credit beneficiary complied by sending a demand letter on its stationary and the affidavit of default. The Texas court cited with

approval the Texas Appellate Court decision in Travis Bank & Trust v. State, 660 S.W. 2d 851 (Tex. App. 1983), which held that where a letter of credit did not define the term "draft," a beneficiary could make proper demand on the letter of credit by presenting a simple letter demanding payment. Temple Eastex supra, 672 S.W. 2d at 796-797 (citing Travis supra, 660 S.W.2d at 854-855. In Temple Eastex the court concluded:

> We hold the demand for payment and accompanying documents sent to the bank constituted "drafts" as that term was contemplated by the parties and as that term is usually interpreted when used in letters of credit.

Temple Eastex supra, 672 S.W.2d at 798. See also Titanium Metals Corporation of America v. Space Metals, Inc., 529 P.2d 431 (Utah 1974)(case involving course of dealings excusing submission of draft under the circumstances of that case).

In the case before this Court, the Letter of Credit did not define the term "sight draft." However, the Letter of May 24, 1993 contained a clear demand for payment. That letter specifically referred to the Letter of Credit, gave the required notice of default in the form set out in the Letter of Credit. The demand for payment in the Letter of May 24, 1993 was for a sum certain. That letter was prepared, signed, submitted to and received by the Bank long before any expiry of the Letter of Credit. The Bank never objected to either the form, content or timing of the May 24, 1993 Letter. The Bank never gave notice

that demand was nonconforming or defective. R-105-106. Under the reasoning of Chase Manhattan and Temple Eastex that letter was effective as a sight draft made upon the Letter of Credit.

B. AN INSTRUCTION TO HOLD PROCEEDS OF A LETTER OF CREDIT DOES NOT AND CANNOT REASONABLY BE CONSTRUED TO CONSTITUTE A REVOCATION, WITHDRAWAL OR CANCELLATION OF AN EARLIER DEMAND MADE ON THE LETTER OF CREDIT.

In Coyne's Letters of May 28, 1993 and June 1, 1993, it or its attorney simply advised the Bank to hold the proceeds of the Letter of Credit. R-77, 79, 101-102, 207, 214; Addenda "C" and "D." Nothing in either of those letters uses the words "revoke", "cancel", "rescind" or "withdraw." Each of those letters was written after the May 24 demand on the letter had already been written to and received by the Bank. R-254. The pivotal issue in this case is whether a request to "hold the proceeds" of a letter of credit, can or should operate to revoke or rescind the prior demand Coyne had made on that letter of credit.

The term "proceeds" has a long standing, consistent commercial definition under both statutory and common law.[2]

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[2]Black's Law Dictionary (West ed. 1951), p. 1369, defines "proceeds" as: Issues; income; yield; receipts; produce; money or articles or other thing of value arising or obtained by the sale of property; the sum, amount, or value of property sold or converted into money or into other property. (citation omitted)(emphases added).

"Proceeds" is specifically defined in the Utah Uniform Commercial Code as follows:

> "Proceeds" includes whatever is received upon the sale, lease, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. Money, checks, deposit accounts, and the like are "cash proceeds." All other proceeds are "noncash proceeds."

Utah Code, Section 70A-9-306(1); See also, Insley Manufacturing Corporation v. Draper Bank and Trust, 717 P.2d 1341, 1343 (Utah 1986).

In the Tenth Circuit decision In re Hastie, 2 F.3d 1042 (10th Cir. 1993), that court made the following observations with respect to the Uniform Commercial Code's definition of proceeds:

> "[P]roceeds" are defined as "whatever is received upon the sale, exchange, collection or other disposition of the collateral or proceeds." (citing 9-306(1) of the Code). With respect to this definition, the term "sale" may be defined generally as '[a] revenue transaction where goods or services are delivered to a customer in return for cash or a contractual obligation to pay. [The] [t]erm comprehends [a] transfer of property from one party to another for valuable recompense. Black's Law Dictionary, 5th ed. at 1200 (1979). Similarly, the term "exchange" may be defined as "[the] [a]ct of giving or taking one thing for another,' Id. at 505, and the term "collect" in the context of a debt or claim may be defined as 'payment or liquidation of it," Id. at 238. Lastly, the phrase "other disposition" may be defined generally as the [a]ct of disposing; [or] transferring to the care or possession of another; [or] [t]he parting with, alienation of, or giving up [of] property. Id. at 423.

Hastie supra, 2 F.3d at 1045. See also, In the Matter of Munger, 495 F.2d 511, 513 (9th Cir. 1974), (. . .the word "proceeds" is to be given a flexible and broad content).

Applying the language of Section 70A-9-306(1) of the Utah Uniform Commercial Code defining "proceeds" and the definitions in Hastie as to "exchanges,""collections," "transfers" and "other dispositions" of proceeds, the intangible contract rights Coyne had in the Letter of Credit became, proceeds generated by an exchange, collection, transfer, or other disposition, upon Coyne's May 24, 1993 demand to the Bank on the Letter of Credit. Coyne's demand fully complied with the specific terms and requirements set forth in the Letter of Credit. The Bank did not object to the form or content of the demand. Having made a timely and proper demand, Coyne had every reason to believe, first that its demand had been accepted, and second, that by exchange, transfer or other disposition, the Letter of Credit's $33,000.00 face amount had been reduced to proceeds. Such was certainly Coyne's understanding. R-171, 172, 248.

In addition to the Utah Uniform Commercial Code Section 70A-9-306(1), that portion of the Code dealing specifically with letters of credit makes a clear distinction between drawing on a letter of credit and the right to the letter of credit's proceeds

after such proceeds have been generated. Section 70A-5-116(3) of the Utah Code provides:

> Except where the beneficiary has effectively assigned his right to draw **or** his right to proceeds nothing in this Section limits his rights to transfer or negotiate drafts of demands drawn under the credit. (emphasis added).

The above cited section of the Utah Code recognizes that a draw or demand made on a letter of credit is a separate matter from the right to receive the letter of credit's proceeds. By distinguishing between draws and proceeds, Section 70A-5-116(3) recognizes that a right to proceeds is not synonymous with a right to draw. And at least by implication, that section acknowledges that action taken with respect to a right to receive a letter of credit's proceeds is not the same as the right to draw on the letter. In light of Section 70A-5-116(3) it is difficult to understand how the Bank can possibly claim that a request to hold proceeds somehow operated as a revocation, withdrawal or rescission of the earlier demand made on the Letter of Credit itself.

In light of the statutory and case law definitions of proceeds, the timing of Coyne's letters of May 28, 1993 and June 1, 1993, which in very narrow terms simply instructed the Bank to hold the proceeds, the language of 70A-5-116(3) which draws distinction between a right to draw and a right to proceeds, and

the absence of any words of revocation, withdrawal or rescission in the Letters of May 28, 1993 and June 1, 1993[3], the only reasonable interpretation of the language in Coyne's letters to the Bank is that Coyne instructed the Bank to hold the proceeds of the Letter of Credit and not to revoke or withdraw the earlier demand made on the credit itself.

C. BY FAILING TO GIVE COYNE NOTICE OF ANY PROBLEM WITH ITS DEMAND ON THE LETTER OF CREDIT UNTIL AFTER THAT LETTER HAD ALLEGEDLY EXPIRED, THE BANK IS NOW ESTOPPED FROM CLAIMING EXPIRY.

Since Coyne made a proper and timely demand on the Letter of Credit, and since the Letters of May 28 and June 1, 1993 did not revoke or withdraw the earlier demand, the district court erred in holding that the Letter of Credit expired before Coyne made its demand on the Letter of Credit. In addition, under the facts of this case, the Bank's failure to timely notify Coyne that its demand was nonconforming or that the Bank believed that Coyne's demand had been withdrawn, estops the Bank from now raising the expiry issue. By failing to give Coyne any notice whatever until after the Bank claimed the Letter of Credit had expired, the Bank lulled Coyne into thinking that Coyne's demand

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[3]The Letter of May 28, 1993 was written by Coyne's lawyer, to whom the word "proceeds" would have a definite legal meaning. Had he intended to cancel the demand, the term "hold the proceeds" would be an odd nomenclature for an attorney. Had he wanted to cancel, withdraw or rescind the letter, words using those terms would have more clearly announced that purpose.

on the letter had been accepted and that the Bank was holding the proceeds of the letter according to Coyne's request. R-105, 248. Cases which have decided analogous issues have estopped banks from raising defenses which were asserted for the first time at or after the expiry date of the applicable letter of credit.

In Crocker Commercial Services, Inc. v. Countryside Bank, 538 F.Supp. 1360 (D.C. Ill. 1981), a beneficiary of a letter of credit sued the issuing bank for wrongful dishonor of a demand made upon a letter of credit. The bank waited until after the letter of credit had already expired before informing the beneficiary that the documents in its demand were nonconforming. The federal district court granted the beneficiary's motion for summary judgment, noting:

> Bank's conduct may fairly be viewed as creating either a waiver or estoppel, for it stood by silently and permitted the Letter of Credit to run out, even though an identification of the claimed deficiencies would have enabled Crocker to cure them.
>
> * * *
>
> For that reason the failure to make timely objection is a waiver of any curable flaws in the beneficiary's demand. Had Bank voiced its objections to Crocker at any time through January 20 [the expiry date], Crocker could have cured the hypertechnical language difficulties now relied upon by Bank.

Crocker supra, 538 F.Supp. at 1363.

In Marino Industries v. Chase Manhattan Bank, N.A., 686 F.2d 112 (2d Cir 1982), the beneficiary sued the bank on several

letter of credit transactions. With respect to one of those transactions it appeared that certificates of inspection were to be submitted as part of the demand on the letter. The beneficiary submitted the certificates before the letter of credit expired, but the bank waited until after the expiration date before returning the certificates. The Circuit Court wrote:

> A further problem with respect to the certificates of inspection is presented by the fact that Chase waited a month-and-a-half before returning them to Marino for correction. Under article 8(d) of the Uniform Customs & Practice for Documentary Credits, Chase had "a reasonable time" within which to examine the documentation [citation omitted]. If Chase had returned the certificates promptly, Marino would have had ample time to correct any deficiencies. By not returning the certificates until after the letter had expired, Chase made it impossible for Marino to correct any deficiencies and still make timely presentation [citations omitted].

Marino Industries supra, 686 F.2d at 118.

In Integrated Measurement Systems, Inc. v. International Commercial Bank of China, 757 F.Supp. 938 (D. Ill. 1991), the federal district court granted summary judgment against a beneficiary on letters of credit. The letter of credit required presentation of certain documents before the letter would be honored. The letter was subject to the UCP. Nearly three weeks before the expiry of the letter, the beneficiary submitted its documents. The bank waited until after the letter

had expired before returning the documents for alleged noncompliance. The court decided against the banks, holding:

> Under UCP Art. 16 Banks are estopped from arguing nonconformity by reason of the failure to give Integrated Measurement timely notice of the defects. International Bank received Integrated Measurement's documents on March 10 and did not notify Integrated Measurement of its objections until March 30--fully 20 days later and, indeed, five days after the credit had expired, so that Integrated Measurement was precluded from curing the defect.

Integrated Measurement supra, 757 at 947 (emphasis in original).

In the instant case, the Bank never informed Coyne that the Bank claimed Coyne's May 24, 1993 demand on the Letter of Credit was nonconforming or defective. The Bank never informed Coyne that it would not hold the proceeds of the Letter of Credit as requested in the May 28 and June 1, 1993 Letters. The Bank allowed the expiry date on the Letter of Credit to pass without giving Coyne any written or other response to either the demand or the requests to hold the proceeds. R-105-106, 248-249.

In Crocker, Marino and Integrated Measurement the courts held that a bank's belated responses to the beneficiary, given only after the letters of credit had expired, were ineffective and estopped the bank from claiming defects or nonconformance with respect to the demand on the letter of credit. But in those cases at least a response was given. Prior to the time it filed suit, Coyne never received any information

nor was it given any indication that its demand on the letter had not been accepted nor that the Bank had not honored the request to hold the proceeds. R-248-249. See also R-105-106.

The Bank's failure to give timely notice to Coyne that the demand was ineffective or that the Bank would not hold the proceeds of the Letter of Credit greatly prejudiced Coyne. In the absence of notice from the Bank that the Bank was not holding the proceeds, Coyne was lulled into the reasonable belief that there was no need to do anything further with respect to the Letter of Credit until after the arbitration matter was terminated. The Bank waited until months after the expiry date and indeed after suit was filed before revealing to Coyne that it had not held the proceeds as requested by Coyne. R-248-249. Even after the October 25, 1993 Letter, the Bank still never gave Coyne timely notice that it would not honor the Letter of Credit.

D. THE TRIAL COURT ERRED IN NOT FINDING THAT THE PROVISIONS OF THE UCP ESTOP THE BANK FROM FAILING TO HONOR THE LETTER OF CREDIT.

The Letter of Credit provided it was governed by the terms of the UCP then in effect. R-91, 216. Addendum "A." As quoted above, Article 16 of the UCP which governed the Letter of Credit requires an issuing bank that intends to refuse documents submitted with a demand, as not conforming, to give the presentor or beneficiary "notice to that effect without delay" of the

dishonor. UCP 16(d). The notice must contain a description of the alleged discrepancies and inform the appropriate party that the bank will hold the documents at the disposal of the presentor or return the documents. Id. If the bank fails to do so, it is precluded from claiming nonconformance of the documents. UCP 16(e). In the case before this Court, the Bank did nothing.

Cases which have arisen under the UCP have held that where the issuing bank fails to promptly object to alleged nonconforming demands on a letter of credit, the bank is estopped from raising the defense of nonconformance. In Kerr-McGee Chemical Corporation v. Federal Deposit Insurance Corporation, 872 F.2d 971 (11th Cir. 1989), the beneficiary of a letter of credit sued the successor of an issuing bank. The bank had failed to timely specify alleged defects in the documents presented when demand was made. As in the case here, the letter of credit in Kerr-McGee provided it was subject to the 1983 revision of the UCP. Kerr-McGee supra, 872 F.2d at 973. The Eleventh Circuit held that since the credit was governed by the UCP, the issuing bank's failure to allege and identify the supposed defects in the demand on the letter of credit estopped the bank from later relying on such defects as grounds for avoiding payment. In the course of the opinion the court held:

> We think this provision [UCP Article 16(e)] makes plain that a bank will be estopped from subsequent

reliance on a ground for dishonor if it did not specify that ground in its initial dishonor.

Id.

Later in the opinion the court noted:

> The 1983 UCP provides that the bank must state its reason for dishonor, and that failure to state these reasons will preclude a later claim of discrepancy. UCP Art. 16e. It is true that courts have varying approaches to the application of estoppel to letter of credit transactions. This fact is not relevant, however where the parties have explicitly incorporated the 1983 UCP in the letter of credit.

Kerr-McGee supra, 872 F.2d at 974.

In Bank of Cochin, Ltd. v. Manufacturers Hanover Trust Co., 808 F.2d 209 (2d Cir. 1986), an issuing bank brought suit against a confirming bank for wrongful dishonor of a letter of credit. The Second Circuit affirmed summary judgment in favor of the confirming bank on grounds that the issuing bank gave untimely notice of document noncompliance. The letter of credit was governed by the then applicable version of the UCP. After considering what it deemed to be the relevant issues in the matter the court concluded:

> We hold, therefore, that Cochin's delay in specifying the defects estopped it from asserting that the documents did not comply with the letter of credit, and that Cochin's two-week delay in notifying MHT [the confirming bank] of its intent to return the documents precludes this suit. . . .

Bank of Cochin, 808 F.2d at 213. See also, Marino Industries, 686 F.2d at 118.

Applying the rationale of the Kerr-McGee and Bank of Cochin cases, each of which involved letters of credit which were governed by the provisions of the UCP, to the case now before this Court, the Bank's failure to give Coyne any notice, let alone timely notice, that the demand on the Letter of Credit was nonconforming or that the Bank would not hold the proceeds of that credit contractually estops the Bank from raising any alleged defect or deficiency in the demand, the Letters of May 28, and June 1, 1993 and/or the Letter of October 25, 1993.

II. THE DISTRICT COURT ERRED IN REFUSING TO ALLOW COYNE'S REQUEST FOR ORAL ARGUMENT ON ITS MOTION FOR SUMMARY JUDGMENT.

As cited earlier, Rule 4-501(3)(b) of the Utah Code of Judicial Administration provides that where the granting of a motion would dispose of all or part of an action, either party may file a written request for hearing. That motion for oral argument is to be made at the time of filing a party's principal memorandum. Id. Subpart (c) of Rule 4-501(3) provides that the request for oral argument shall be granted unless the underlying motion is either frivolous or unless the dispositive issues relevant to the motion have previously been authoritatively decided.

In the instant case, Coyne filed its request for oral argument at the time of its original motion for summary judgment.

R-97-98. The district court's memorandum decision and its formal order granting the Bank's motion for summary judgment and denying Coyne's motion for summary judgment and request for oral argument simply denied the request for oral argument. R-279-281[4]. The district court entered no finding that Coyne's motion for summary judgment was frivolous. Id. See also, Addendum "F" and Addendum "G". Neither did the district court cite any prior controlling or authoritative decision which was adverse to the positions urged by Coyne. Id. Insofar as Coyne has been able to determine, the issues raised in this appeal are matters of first impression for a Utah court.

Coyne has found no Utah case authority interpreting the language or scope of Rule 4-501(3)(b)-(c). However, from the statute's plain language the right to oral argument appears mandatory unless the court finds the motion is frivolous or resolved by prior controlling authority. Subsection (c) states:

> Such request [for oral argument] shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing ;the granting or denial of the motion has been authoritatively decided. (emphasis supplied).

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[4]The entire memorandum decision and order granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment and request for oral argument are included as Addendum "F" and Addendum "G" respectively.

In a sister state decision State ex rel. Frohnmayer v. Bicar, Inc. 850 P.2d 1163 (Ore App. 1993) the defendant moved to dismiss plaintiff's complaint. In conjunction with that motion defendant requested oral argument. The trial court denied both the motion and the request for oral argument. The Oregon Uniform Trial Court Rules 5.050(1) provide in part: "There shall be oral argument if requested by the moving party in the caption of the motion or by a responding party in the caption of a response." The Oregon Court of Appeals reversed the trial court decision and remanded the case, holding that the Oregon rule requiring oral argument was mandatory. In the course of the opinion the Oregon court observed:

> Oral argument offers the parties an important opportunity to clarify arguments and to respond to the judge's questions about the record and the legal issues that the judge deems critical. Oral argument promotes an understanding of the dispute that written communication does not always duplicate. As this court can confirm, oral argument can induce the judge to consider or to change preliminary conclusions reached after a review of written briefs. It also serves to assure the public that the judge has considered the case and is accountable for the decision. Defendants' opportunity to appeal and seek reversal of legal errors does not eliminate the prejudicial effect of the denial of the opportunity for an optimal decision-making process in the trial court. The court's refusal to allow oral argument, as required by the UTCR 5.050(1), was reversible error.

Bicar supra, 850 P.2d at 1165.

Similarly, in the Hawaii Supreme Court decision in Jensen v. Pratt, 491 P.2d 547 (Hawaii 1971) the trial court entered summary judgment without affording opportunity for oral argument to the party against whom the motion was granted. On appeal the state supreme court held that the failure to grant oral argument, contrary to the state rule affecting summary judgment, so strongly affected a party's right as to constitute harmful error per se.

In reversing the trial court decision the appellate court wrote:

> We have neither a rule nor an order generally dispensing with the requirement of oral hearings on motions for summary judgment. Accordingly, we think that the failure of the trial court to give the parties an opportunity to be heard orally as required by H.R.C.P. Rule 56(c) was reversible error.

Jensen supra, 491 P.2d at 548.[4]

---

[4]In a federal court decision interpreting the scope of Rule 56(c) of the Federal Rules of Civil Procedure the Ninth Circuit wrote:

> [I]n view of the language of Rule 56(c), and having in mind that the granting of such a motion disposes of the action on the merits, with prejudice, a district court may not, by rule or otherwise, preclude a party from requesting oral argument, nor deny such a request when made by a party opposing the motion unless the motion for summary judgment is denied (citation omitted)

Dredge Corporation v. Penny, 338 F.2d 456, 462 (9th Cir. 1964).

Coyne respectfully urges that the reasoning of the Oregon appellate court in Bicar is particularly pertinent here. Both the Utah and the Oregon statutes speak in terms of mandatory rights to oral argument if the request for such argument has been timely raised. The district court should have granted Coyne's motion for oral argument and committed reversible error in not affording Coyne the opportunity for that oral argument.

CONCLUSION

The district court erred in granting the Bank's motion for summary judgment. It also erred in failing to grant Coyne's motion for summary judgment. Coyne made a proper, timely demand on the Letter of Credit. That demand was never revoked or withdrawn. In any event, the Bank failed to give timely notice of any rejection of Coyne's demand on the Letter of Credit as required by its contractual adoption of the Uniform Customs and Practice for Documentary Credits (1983 Revision). Bank also failed to give timely notice that it had failed to comply with Coyne's request that the Bank hold the proceeds of the Letter of Credit. The District Court erred in failing to grant Coyne's motion for summary judgment on these bases.

It was also reversible error for the trial court not to allow Coyne the opportunity for oral argument after Coyne had

made timely request for such oral argument consistent with the Utah Rules of Judicial Administration.

Appellant Coyne requests the Court to reverse the ruling of the District Court, remand this case, and order that judgment be entered in favor of Appellant Coyne.

DATED this 20th day of December, 1995.

Respectfully submitted,

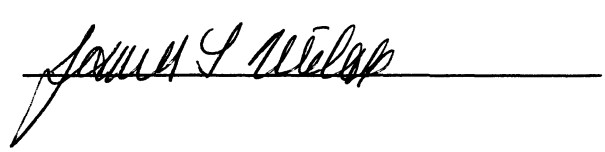
RAY, QUINNEY & NEBEKER

Attorneys for the Plaintiff and Appellant, Coyne International Enterprises Corp. d/b/a/ Coyne Textile Services

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANTS was mailed, postage prepaid, on this 20th day of December, 1995 to the following:

William G. Marsden
Jennie B. Huggins
JARDINE, LINEBAUGH, BROWN & DUNN
370 East South Temple Street
Suite 400
Salt Lake City, Utah 84111
Attorneys for the Defendant and
Appellee, Zions First National
Bank



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Tab A

ZIONS
FIRST NATIONAL BANK
ESTABLISHED 1873

INTERNATIONAL BANKING DEPARTMENT
P.O. Box 30709
Salt Lake City, Utah 84130 U.S.A.

Telephone: 801/524-4916
Telex: 3789475 Answerback: INTBKZIONS SLC
Swift Code: ZFNBUS55

IRREVOCABLE LETTER OF CREDIT

COYNE TEXTILE SERVICE
140 COURTLAND AVENUE.
SYRACUSE, NEW YORK 13221.

DATE: JUNE 23, 1992

LETTER OF CREDIT NO.: Nº 005248

Gentlemen:

We hereby establish our *Irrevocable Letter of Credit* in your favor for the account of

STANLEY R. POPE, 582 SOUTH 450 EAST, OREM, UTAH 84058

up to the aggregate amount of USD33,000.00

available by your draft(s) drawn at SIGHT

on Zions First National Bank, Salt Lake City, Utah accompanied by:

STATEMENT ON COYNE TEXTILE SERVICE LETTERHEAD PURPORTEDLY SIGNED BY AN OFFICER OF COYNE TEXTILE SERVICE THAT STANLEY R. POPE HAS NOT FULFILLED THE TERM OF CONTRACT RELATING TO THE LEASE OF ONE LEAR JET 25-D AIRCRAFT STATING THE REASON.

PARTIAL DRAWINGS ARE PERMITTED.

* * * * * * * * * * * * * * * * *

We hereby agree with drawers, endorsers and bona fide holders that all drafts drawn under and in compliance with the terms of this credit will be duly honored upon presentation and delivery of documents as specified to the drawee if drawn and presented for negotiation on or before AUGUST 31, 1993 at our bank.

The Amount and Date of Each Negotiation Must Be Endorsed on the Back Hereof by the Negotiating Bank.

This Credit is Subject to the Uniform Customs and Practice for Documentary Credits

Very Truly Yours,

Tab B

COYNE TEXTILE SERVICES

COYNE INTERNATIONAL ENTERPRISES CORP.

EXECUTIVE OFFICES
P.O. Box 4854
140 Cortland Avenue
Syracuse, New York 13221
(315)475-1626

BALTIMORE, MD
BANGOR, ME
BECKLEY, WV
BETSY LAYNE, KY
BRISTOL, TN
BUFFALO, NY
BURLINGTON, VT
CHARLESTON, WV
CLEVELAND, OH
DU BOIS, PA
ERIE, PA
[illegible]MONT, WV
HAZLETON, PA
HUNTINGTON, WV
JOLIET, IL
LONDON, KY
LONG ISLAND, NY
NEWARK, NJ
NEW BEDFORD, MA
PHILADELPHIA, PA
PITTSBURGH, PA
SCHENECTADY, NY
SEAFORD, DE
SMITHBORO, NY
SYRACUSE, NY
TOLEDO, OH
WATERBURY, CT
WINCHESTER, VA
WORCESTER, MA
YORK, PA

May 24, 1993

Zions First National Bank
International Banking Department
P.O. Box 30709
Salt Lake City, Utah 84130

Attention: Ralph G. Nelson

Re: Letter of Credit
Number 005248

Dear Mr. Nelson:

This is to certify that Stanley R. Pope has not fulfilled the term of the contract relating to the lease of one Learjet 25-D. Mr. Pope has defaulted in the payment of rent and other amounts in excess of the face amount of the attached letter of credit.

Please pay the entire amount of Thirty-Three Thousand ($33,000.00) Dollars to our attorney, David P. O'Hara, at the following address:

O'Hara & Hanlon
David P. O'Hara
9 Albany Street
Cazenovia, New York 13035

Very truly yours,

Coyne Textile Services

By: Raymond T. Ryan
An Officer (Treasurer)

DPO/LH
Enclosure

Tab C

O'Hara & Hanlon

Attorneys at Law

David P. O'Hara
Kerry J. Hanlon

Peter W. Knych
Alexandor Pobedinsky

Of Counsel:
Robert G. Ritz

9 Albany Street
Canenovia, New York 13035
315-655-8000

Counsel:
Peter W. Mitchell

Syracuse Office
One Park Place
Syracuse, New York 1320
315-422-5177

May 28, 1993

Zions First National Bank
International Banking Department
P.O. Box 30709
Salt Lake City, Utah 84130

Attn: Ralph G. Nelson

Re: Letter of Credit
Number 005248

Dear Mr. Nelson:

As you know, this firm is general counsel to Coyne Textile Services ("CTS"). Mr. Raymond T. Ryan of CTS has forwarded to you a demand on the above-referenced letter of credit.

As I indicated in my May 25, 1993 letter to Mr. Pope, he has a right to object to the CTS demand on the letter of credit. His objections are to be resolved by arbitration in Onondaga County, New York and I am proceeding to schedule that arbitration.

As a result of Mr. Pope's objections, I am writing to notify you that the proceeds of the letter of credit are not to be paid as directed in Mr. Ryan's demand of May 25, 1993 and that you should hold the proceeds until you receive further instructions from this office.

A confirming letter will be forthcoming from Mr. Ryan.

Very truly yours,

O'Hara & Hanlon

By: David P. O'Hara

DPO/sm
cc: Mark F. Robinson, Esq.

Tab D

COYNE TEXTILE SERVICES

COYNE INTERNATIONAL
ENTERPRISES CORP

EXECUTIVE OFFICES:
P.O. Box 4854
140 Cortland Avenue
Syracuse, New York 13221
(315) 475-1628

June 1, 1993

Zions First National Bank
International Banking Department
P.O. Box 30709
Salt Lake City, Utah 84130

Attn: Ralph G. Nelson

RE: Letter of Credit
Number 005248

Dear Mr. Nelson:

As is set forth in Mr. O'Hara's letter of May 28, 1993, you are authorized to hold the proceeds of the above referenced letter of credit until you receive further instructions from Mr. O'Hara.

Very truly yours,

Raymond T. Ryan
Chief Financial Officer

RTR:jmr

BALTIMORE, MD
BECKLEY, WV
BETSY LAYNE, KY
BRISTOL, TN
BUFFALO, NY
BURLINGTON, VT
CHARLESTON, WV
CLEVELAND, OH
DU BOIS, PA
ERIE, PA
FAIRMONT, WV
HAZLETON, PA
HUNTINGTON, WV
JOLIET, IL
LEWISTON, ME
LONDON, KY
LONG ISLAND, NY
NEWARK, NJ
NEW BEDFORD, MA
PHILADELPHIA, PA
PITTSBURGH, PA
RICHMOND, VA
SCHENECTADY, NY
SEAFORD, DE
SMITHBORO, NY
SYRACUSE, NY
TOLEDO, OH
WATERBURY, CT
WINCHESTER, VA
WORCESTER, MA
YORK, PA

Tab E

O'Hara & Hanlon

Attorneys at Law

David P. O'Hara
Kerry J. Hanlon

Peter W. Knych
Alexander Pobedinsky

Of Counsel:
Robert G. Ritz

One Park Place
Syracuse, New York 13202

315-422-5177

Counsel:
Peter W. Mitchell

Cazenovia Office
9 Albany Street
Cazenovia, New York 13035
315-655-9061

October 25, 1993

Via Certified Mail
Return Receipt Requested

Zions First National Bank
International Banking Department
P.O. Box 30709
Salt Lake City, Utah 84130

Attn: Dale Marcotte

Re: Letter of Credit No. 005248

Dear Mr. Marcotte:

This firm is general counsel to Coyne Textile Services, ("CTS") the beneficiary of the above-referenced letter of credit. As you may know, Mr. Raymond T. Ryan of CTS made a proper and timely demand on the letter of credit on May 24, 1993. However, as is set forth in my letter to the bank dated May 28, 1993, and Mr. Ryan's letter dated June 1, 1993, copies of which are enclosed, CTS authorized you to hold the proceeds of the letter of credit until you received further instructions from this office. This letter shall constitute such further instructions.

Because the pending arbitration referenced in my May 28, 1993 letter has been resolved in CTS' favor as evidenced by the enclosed copy of the arbitration award, we are now instructing you to forward the entire proceeds of the letter of credit in the amount of $33,000.00 to the following office:

O'Hara & Hanlon
David P. O'Hara, Esq.
9 Albany Street
Cazenovia, New York 13035

Please be advised that our client has authorized us to initiate litigation against the bank in the event that the proceeds are withheld.

At the request of your legal counsel, William G. Marsden, we are copying him with this letter, including enclosures.

Thank you for your anticipated cooperation in this matter.

Very truly yours,

O'HARA & HANLON

By: David P. O'Hara/sb
David P. O'Hara

DPO/sb
Enclosures

cc: William G. Marsden, Esq.

Tab F

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

COYNE INTERNATIONAL ENTERPRISES CORP., d/b/a COYNE TEXTILE SERVICES, a New York Corporation, Plaintiff, vs. ZIONS FIRST NATIONAL BANK, Defendant.	**MEMORANDUM DECISION** CASE NO. 930400620 DATE: May 30, 1995 JUDGE: RAY M. HARDING LAW CLERK: Laura Cabanilla DEPUTY CLERK: Georgia Snyder EXTERN: Andrew Pickering

This matter came before the Court upon Notices to Submit for consideration of Defendant's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment and Request for Oral Argument. Having received and considered Defendant's and Plaintiff's Motions, together with memoranda in support, in opposition, and in reply to the motions, the Court hereby grants the Defendant's motion and denies the Plaintiff's motion. The Court finds that although the parties disagree on the interpretation of certain facts, that there are no material facts at issue regarding either Defendant's or Plaintiff's motions for summary judgment and therefore rules as a matter of law.

On May 24, 1993, Plaintiff had requested a draw on a Letter of Credit which had been issued by Defendant on June 23, 1992. Then, in letters dated May 28, 1993, and June 1, 1993, Plaintiff instructed Defendant to hold the proceeds until Defendant received further instructions. Once arbitration was resolved in Plaintiff's favor, Plaintiff demanded the draw on the Letter of Credit by letter dated October 25, 1993. Defendant refused to pay, stating that the Letter of Credit had expired by its own terms.

Plaintiff argues that the language in the May 28th and June 1st letters, asking Defendant to "hold the proceeds" until Defendant received further instructions, merely asked that the proceeds

of the draw on the Letter of Credit be held in trust for Plaintiff, pending arbitration with the beneficiary of the Letter of Credit, and that the letters did not withdraw Plaintiff's request for draw on the Letter of Credit.

Defendant argues that the letters dated May 28, 1993, and June 1, 1993, sent by Plaintiff's attorney and Plaintiff, respectively, withdrew Plaintiff's request for payment made in a letter dated May 24, 1993. The Letter of Credit expired on August 31, 1993, and thereby rendered no obligation to pay Plaintiff pursuant to its request for payment in a letter dated October 25, 1993.

The Court finds that, "[t]he basic rule applicable to letters of credit is that the obligation set forth therein must be strictly construed and performed precisely in accordance with its terms." NewVector Communications v. Union Bank, 663 F. Supp. 253, 255 (D. Utah 1987). A crucial term of the Letter of Credit is the date of expiration.

Plaintiff attempts to impose a duty on Defendant to hold those proceeds for Plaintiff in some kind of trust or escrow, a duty which Defendant never contracted to perform, and which the Court finds should not be imposed. The Letter of Credit dictated that it expired on August 31, 1993, ending Defendant's obligation to pay. Construing Plaintiff's letters as requests for putting the proceeds of the Letter of Credit in trust circumvents Plaintiff's obligation to either demand payment before the expiration of the Letter of Credit or request an extension or renewal thereof. The certainty of the terms of an Letter of Credit should be preserved.

Therefore, the Court finds that the letters asking that the proceeds be held by Defendant for Plaintiff were a withdrawal of the request for payment and a confirmation of such. Further, the Court finds that Defendant's obligation to pay on the Letter of Credit expired on August 31, 1993, and Defendant had no duty to honor Plaintiff's request for payment dated October 25, 1993.

Plaintiff's Request for Oral Argument is denied.

Counsel for Defendant is to prepare an order within 15 days of this decision consistent with the terms of this memorandum and submit it to opposing counsel for approval as to form prior to submission to the Court for signature. This memorandum decision has no effect until such order is

signed by the Court.

Dated this 30th day of May, 1995.

BY THE COURT:

RAY M. HARDING, JUDGE

cc: Jennie B. Huggins, Esq.
Craig Carlile, Esq.

STATE OF UTAH)
) SS
COUNTY OF UTAH)

I, the undersigned, Clerk of the Fourth District Court of Utah County, Utah, do hereby certify that the annexed and foregoing is a true copy of an original document on file in my office as such Clerk.

Witness my hand and seal of said Court this ____ day of _____, 19__.

CARMA B. SMITH, Clerk

By _____ Deputy

Tab G

William G. Marsden (#2087)
Jennie B. Huggins (#5486)
JARDINE, LINEBAUGH, BROWN & DUNN
A Professional Corporation
Attorneys for Defendant
370 East South Temple, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 532-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR

UTAH COUNTY, STATE OF UTAH

COYNE INTERNATIONAL ENTERPRISES CORP, d/b/a COYNE TEXTILE SERVICES, a New York corporation, Plaintiff, **v.** ZIONS FIRST NATIONAL BANK, Defendant.	ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR ORAL ARGUMENT Civil No. 930400620CN Judge Ray M. Harding

This matter having come before the Court upon Notices to Submit for consideration of Defendant's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment and Request for Oral Argument; the court having received and considered the Motions, together with memoranda in support, in opposition, and in reply to the Motions; the court having determined that there are no genuine issues of material fact and that this matter may be determined as a matter of law; and the court having issued its Memorandum Decision, it is hereby

ORDERED that Defendant's Motion for Summary Judgment be, and hereby is, granted. It is further

ORDERED that the Complaint be, and hereby is, dismissed with prejudice and on the merits. It is further

ORDERED that Plaintiff's Motion for Summary Judgment be, and hereby is, denied. It is further

ORDERED that Plaintiff's Request for Oral Argument be, and hereby is, denied.

DATED this 17 day of July, 1995.

BY THE COURT

RAY M. HARDING
DISTRICT JUDGE

Approved as to form:

RAY, QUINNEY & NEBEKER

By: _____
Craig Carlile
Attorneys for Plaintiff

STATE OF UTAH)
) SS
COUNTY OF UTAH)

I, the undersigned, Clerk of the Fourth District Court of Utah County, Utah, do hereby certify the annexed and foregoing to be a true and correct copy of the original document on file in my office.
Witness my hand and seal of said Court this _____ day of _____, 19__.
CARMA B. SMITH, Clerk

By _____ Deputy

MAILING CERTIFICATE

I hereby certify that on the 9th day of June, 1995, I served the foregoing proposed ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR ORAL ARGUMENT by mailing a duplicate original thereof by first-class United States mail, postage pre-paid and addressed as follows:

Craig Carlile
RAY, QUINNEY & NEBEKER
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